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No. 516

IN THE

Supreme Court of the United States

October Term, 1968

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

Petitioner, Harry S. Berberian, prays that a Writ of Certiorari, issued to review the decision of the Supreme Court of Pennsylvania for the above entitled case, refusing to hear the appeal of petitioner from the judgment of the Superior Court of Pennsylvania, affirming the judgment of sentence of the Court of Quarter Sessions for the County of Lancaster of March Sessions, 1966, Numbers 63 and 64. The opinion of the Supreme Court of Pennsylvania was filed on July 18, 1968.

OPINION BELOW

The memorandum opinion of the Supreme Court of Pennsylvania, filed July 18, 1968 is appended to this petition as appendix A.

JURISDICTION

The memorandum opinions of the Supreme Court of Pennsylvania (appendix A) and the Superior Court of Pennsylvania, (appendix B) affirmed the judgment of sentence of the Court of Quarter Sessions for the County of Lancaster as of March Sessions, 1966, Numbers 63 and 64.

A copy of the opinion of the lower court is attached and appended to this petition as appendix C.

The jurisdiction of this court is confirmed by the Act of June 25, 1948, C 646, 62 Stat. 728, 28 U.S.C. §1254, which provides for review of final judgment or decrees rendered by the highest court of a state by writ of certiorari where any right is claimed under the constitution.

QUESTIONS PRESENTED

1. Is there a need for this Court, at this time, to decide the issue of whether in a case where a witness is erroneously ordered by the trial court to testify on behalf of the prosecution on threat of imprisonment, after the witness has properly claimed the privilege against self-incrimination, a defendant is denied due process of law in a fair trial by the use of such unconstitutionally compelled testimony?

(Answered in the negative by the court below.)

2. Has a defendant in a criminal trial been denied due process of law where the prosecution, in the presence of a jury, calls a witness to the stand and obtains from the witness a claim against self-incrimination where the prosecutor knew in advance that the witness would refuse to testify and where the prosecutor did not seek to have a ruling on a claim first made out of the hearing of the jury?

(Not answered by the court below.)

3. Is a defendant in a criminal trial denied the right to a fair trial and the right to due process of law where the trial court reiterates and revives to the jury evidence which no longer was properly in the case?

(Answered in the negative by the court below.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments providing in part that "No person shall . . . . be deprived of life, liberty or property without due process of law . . . nor shall be compelled in any criminal case to be a witness against himself."

HISTORY OF THE CASE

Appellant, a doctor practicing in Lancaster, Pennsylvania, for many years, was indicted and tried for allegedly having given to two women the name and address of a Philadelphia abortionist.

One of the women, a Miss Melody McFarland, was called as a Commonwealth witness, but declined to testify on the grounds of self-incrimination. Prior to her being called as a witness, the Court and the District Attorney had been advised by her attorney that she would decline to testify. Without first obtaining a ruling from the Court as to the validity of the claim of privilege, Miss McFarland was called to the stand and, in the presence of the jury, declined to testify. Although her testimony clearly incriminated her in the crime of fornication, as well as other crimes, her exercise of the self-incrimination privilege was overruled and on threat of a prison sentence she was compelled to testify. The testimony of Miss McFarland and other Commonwealth witnesses failed to establish the existence of a conspiracy involving the appellant to obtain an abortion for Miss McFarland, and a demurrer was sustained as to the only indictment relating to her. However, the Court did not instruct the jury at any time that it should not consider any of the testimony relating to Miss McFarland in arriving at its verdict on the other two indictments involving another woman. Rather, the Court, on three separate occasions during its instruction to the

jury, made reference to the evidence pertaining to the incident for which a demurrer had been sustained and was no longer in the case.

Additionally, there was testimony from a Mrs. Elaine Ressler that she had also been given the name and address in Philadelphia of a woman who might help her terminate an unwanted pregnancy. The abortionist, one Helen Harris, testified for the Commonwealth that in her only conversation with the appellant pertaining to Mrs. Ressler, he merely asked if she could help Mrs. Ressler, and she agreed to see what she could do. Nothing else was said about the matter. Although the appellant denied having given Mrs. Harris' name and address to Mrs. Ressler, and having presented numerous character witnesses on his own behalf, he was found guilty of having been an accessory before the fact to Mrs. Ressler's abortion and of conspiracy in regard to the same abortion.

Motions for new trial and in arrest of judgment were denied. Although the appellant has never been convicted of any offense he was sentenced to serve a term of imprisonment of not less than six nor more than twelve months. From this judgment of sentence an appeal was taken to the Superior Court of Pennsylvania. On February 13, 1968, the Superior Court of Pennsylvania affirmed the judgment of the lower court. A petition for allowance of appeal was taken to the Supreme Court of Pennsylvania and the petition was denied on July 18, 1968.

ARGUMENT

A. The Appellant Was Denied a Fair Trial and Due Process of Law by the Commonwealth's Use of Testimony which Was Improperly Compelled from a Witness Who Had Claimed the Fifth Amendment Privilege against Self-Incrimination.

The appellant, Dr. Harry S. Berberian, was indicted in Bill No. 65, of March Term, 1966, for conspiracy to commit an abortion on a young woman by the name of Melody McFarland. During the course of the trial a Mr. Gingrich, the attorney for the witness Melody McFarland, twice advised the Court and the district attorney that Miss McFarland intended to exercise her privilege against self-incrimination and not testify if called as a witness by the Commonwealth (R. 50, 101-2). Despite this notice to the Commonwealth, the district attorney nevertheless called Miss McFarland to the stand, and as a result of questions put to her before the jury she twice refused to testify, exercising her privilege against self-incrimination. Argument was heard by the Court as to the basis for the claim of the privilege. The evidence established that Miss McFarland was an unmarried young woman who had gone to a woman abortionist in Philadelphia, allegedly having obtained her address from Dr. Berberian. No abortion was performed on her and she subsequently gave birth to an illegitimate child (R. 106-107). Her attorney argued that her testimony would implicate her in a number of crimes, including the charge of fornication. He called to the attention of the trial Judge, the Honorable William G. Johnstone, the opinion of Judge Wright in his dissent in *Commonwealth v. Fisher* (Appeal of Snyder), 189 Pa. Superior Ct. 13 (joined by Judges Watkins and Gunther). Judge Johnstone overruled the claim of privilege and declared that the Court could and would grant Miss McFar-

land immunity from prosecution (R. 107-108). Rather than face a summary conviction and imprisonment for contempt, Miss McFarland reluctantly agreed to obey the Court's order and testified (R. 108).

There is no doubt that the right to invoke the Fifth Amendment privilege against self-incrimination was entirely one belonging to the witness McFarland. However, it is likewise clear that one whose trial is tainted by improperly ordered and compelled evidence is denied a fair trial and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Unless a defendant in a criminal case is protected from the use of illegally and unconstitutionally compelled testimony against him, the way is open for a prosecutor to run roughshod over the rights of witnesses in an effort to obtain a conviction of a particular defendant. Such a prosecutor need not concern himself about his abuse of constitutional rights, since there is little likelihood he would attempt to use their compelled testimony against them. However, his ends are achieved at the expense of the particular defendant who has been the victim of the unconstitutionally compelled testimony.

It is conceivable, though illusory, that the Court could have mitigated, after the demurrer was sustained, the prejudicial impact of the unconstitutionally compelled testimony by a careful and considerate instruction to the jury. However, none was ever given. There can be no doubt that appellant's complaint against the illegally compelled testimony is well taken, despite the sustaining of his demurrer, in the absence of any instruction to the jury by the trial Court.

B. It Was Prejudicial Misconduct for the District Attorney to have Called a Witness to the Stand and Obtain from the Witness a Claim against Self-Incrimination in the Presence of the Jury, where the District Attorney Knew in Advance that the Witness Would

Refuse to Testify and where the District Attorney Did Not Seek to Have a Ruling on the Claim First Made out of the Hearing of the Jury.

Prior to the witness Melody McFarland being called to testify against the appellant, her attorney, Mr. Gingrich, on two separate occasions advised the district attorney and the Court that his client did not intend to testify as a witness on behalf of the Commonwealth but rather was going to exercise her privilege against self-incrimination (R. 50, R. 101-102). Despite this warning, the district attorney persisted in calling Miss McFarland to testify in the presence of the jury. After answering as to her name and address she declined to answer any questions thereafter, invoking the privilege against self-incrimination. This was followed by argument by counsel as to the manner in which the district attorney was carrying on his questioning. All of this took place in the presence of the jury. Only then was the jury excused by the Court and the balance of the argument in regard to the right of the witness to exercise her privilege discussed by counsel with the Court.

It is clear that such conduct by the district attorney was erroneous and prejudicial to the appellant. This remained so even though the Court overruled, in error, the witness' claim to exercise the right against testifying on the grounds of possible self-incrimination. The harm done the appellant is the creation of an aura of suspicion and connivance in the minds of the jurors who were present. This effect was the subject of comment by the Supreme Court of Colorado in *DeGesualdo v. Colorado*, 364, P. 2d 374, where the Court stated:

> "In holding that the conduct in question was reversible error, we take notice that in the public mind *an odium surrounds the claim of constitutional privilege by a witness* in refusing to testify on the ground that his testimony would tend to incriminate him. This is an aggravating factor. A district attorney,

although in a sense a partisan, is a judicial officer sworn to uphold the Constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant."

In this jurisdiction, a similar conclusion was arrived at by the Court of Appeals for the Third Circuit in *United States v. Tucker*, 267 F. 2d 212.

C. The Petitioner Was Denied Due Process of the Law and a Fair Trial where the Trial Court Revived and Reiterated to the Jury Evidence that Was no Longer Properly in the Case.

The testimony of Melody McFarland in its entirety, and portions of the testimony of policewoman Martin, Detective Corr, and Helen Harris, related entirely to Bill No. 65 of March Term 1966, in which the appellant was charged with conspiracy to commit an abortion on Melody McFarland. At the conclusion of the Commonwealth's case, the appellant's demurrer to this indictment was sustained. No other charge before the Court related to Melody McFarland, and no reference was made to her by the appellant.

The sustaining of the demurrer totally removed from the proper consideration of the jury any of the evidence that had previously been induced in regard to Melody McFarland. There was no proper basis for the jury to consider the testimony in regard to Miss McFarland in determining the guilt or innocence of the appellant on the remaining indictments dealing with the attempted abortion of Mrs. Ressler. *Loews, Inc., v. Cole*, 185 F. 2d 641; *Stewart v. Pen Argyl Nat. Bank*, 307 Pa. 328, 334. Although this would seem eminently clear, the Court below gave no indication that it recognized this. The trial Court gave the jury no adequate instruction that it should (a) disregard entirely the evidence it had heard in regard to

the McFarland charge and (b) gave no consideration to the evidence heard in the McFarland charge in regard to its determination of guilt or innocence on the indictments dealing with Mrs. Ressler. Further, the trial Court revived and emphasized the McFarland testimony, which was no longer in the case, by making three references to it in its charge to the jury.

First, the Court referred to the testimony of policewoman Martin and reiterated her testimony in which she stated she had followed Miss McFarland on a train and then by car as she went to an address in Germantown, which was the home of Helen Harris. The Court added its own observation of this testimony, and declared,

> "You will note the uniformity in approaching the home of Helen Harris. Elaine Ressler later testified that she followed the same route that Melody followed getting off in the 200 block then walking to the home of Helen Harris. Was this by chance that they both did this or was this by design, by instruction?" (R. 149).

The Court here drew a parallel between the testimony in regard to the McFarland charge, which was no longer before the Court or the jury, and the testimony in the Ressler charge, which the jury was yet to decide. Could the jury draw any inference from this statement by the Court other than that it was proper for it to make comparisons between the circumstances involving each of the two women?

Second, the Court further referred to the use of the word "tonsils" which was supposed to serve as an introduction between Miss McFarland, Mrs. Ressler and Helen Harris. The Court stated, at R. 151:

> "[Helen Harris] said that she had given her telephone number to the doctor so as to arrange a time to have her child's tonsils removed. Remember, that the *girls*' at least Elaine Ressler, when she called on

the telephone, said that this is tonsils, according to instructions which she said she received from Dr. Berberian."

The reference to "girls" in the plural clearly related to the only two women in the case involved in attempting to obtain an abortion from Helen Harris, namely, Miss McFarland and Mrs. Ressler. But, of course, the testimony of McFarland was no longer in the case by virtue of the demurrer.

Because of its possible impact, the fact that the McFarland testimony was never clearly and unambiguously taken away from the jury requires that the conviction in the instant case be set aside.

WHEREFORE, for the reasons stated above, petitioner strongly urges that this Court grant review on Writ of Certiorari from the decision of the Supreme Court of Pennsylvania in denying defendant's appeal.

Respectfully Submitted:

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